

# The Plain Meaning of the Automatic Stay in Bankruptcy: The Void/Voidable Distinction Revisited

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"Most of the disputes in the world arise from words."

Morgan v. Jones, Lofft 160, 176, 98 Eng. Rep. 587, 596 (K.B. 1773) (Murray, C.J.).

"There is no surer way to misread any document than to read it literally . . ."

Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, Learned, J., concurring), *aff'd sub nom.* Gemsco, Inc. v. Walling, 324 U.S. 244 (1945).

## I. INTRODUCTION

History has shown us that there is nothing more enduring than discussions about semantics. Indeed, it appears that no discipline is immune from the philology debate.<sup>1</sup> The academic pursuit of law is no different. "Therefore, it is desirable in any study of law to work with the words and concepts that jurisprudence has given us—insofar as this is possible."<sup>2</sup> In the relatively young area of federal bankruptcy code interpretation, the legal community is faced with the sometimes insurmountable task of determining congressional intent in light of the words actually chosen by the legislature. As one might expect, the process can sometimes be frustrating and is rarely exact.

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<sup>1</sup> A researcher in any field must begin with the language:

"Language and our thought-grooves are inextricably interwoven, are, in a sense, one and the same." Thinking is done within the framework of a pre-existing language. But as the researcher widens the scope of knowledge or sharpens down a point, he finds inevitably that old words must have their meanings altered or that new words must be hammered out to encompass new phenomena that are too different to be embraced in old words or concepts.

E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN 19 (1954) (quoting EDWARD SAPIR, LANGUAGE 232 (1939)).

<sup>2</sup> *Id.*

Since Congress enacted the 1978 Bankruptcy Reform Act (hereinafter "the Bankruptcy Code" or "the Code"),<sup>3</sup> academics and practitioners alike have engaged in much discussion over the Bankruptcy Code's purpose<sup>4</sup> and, in particular, how that purpose is to be realized in the enforcement of the Code's specific terminology.<sup>5</sup> Methods of analysis vary, but recently the legal community has paid much attention to the Rehnquist Court's "plain meaning" approach to legislative analysis.<sup>6</sup> As to whether this approach is of any assistance in helping to resolve many of the still lingering issues in bankruptcy law, the jury is still out.<sup>7</sup> It is beyond the scope of this Note to examine the competing theories with any detail, and it would be a disservice to their proponents for me to offer them only lip service here. Accordingly, I will restrict my analysis to the plain meaning approach and to only the limited area of the automatic stay.

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<sup>3</sup> Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1994)); *see infra* part II.

<sup>4</sup> See especially the debate between Professors Douglas G. Baird and Elizabeth Warren in the Summer 1987 issue of the University of Chicago Law Review. Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply To Warren*, 54 U. CHI. L. REV. 815, 831-34 (1987) (seeing bankruptcy as a tool for "crediting priorities among creditors"); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 777 (1987) (taking the position that bankruptcy law exists to distribute the debtor's loss amongst multiple entities).

<sup>5</sup> See generally Martin N. Flics & Melissa J. Cassidy, *The Bankruptcy Reform Act of 1978 As Amended: An Overview*, in BASIC BUSINESS BANKRUPTCY 1991, at 7 (PLI Com. L. & Practice Course Handbook Series No. 574, Order No. A4-4336, 1991).

<sup>6</sup> According to one author, debate has varied over whether the "proper method of statutory interpretation is plain-meaning, legislative intent, dynamic interpretation, social purpose, common law-like development or some other theory." Thomas G. Kelch, *An Apology for Plain-Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEV. J. 289, 292 (1994) (positing that "there are characteristics of the Bankruptcy Code that lend themselves to plain-meaning analysis"). Like Professor Kelch, I believe that the Bankruptcy Code should be interpreted in the light of the plain meaning standard, but not because of some characteristics which inhere to the Code in particular. Rather, I believe that any legislative or linguistic analysis must have a starting point, and there is simply no other logical place to begin than at the beginning, and with language that is with its plain meaning. For a more in-depth analysis of the plain meaning approach to bankruptcy jurisprudence, see *infra* parts V & VI.

<sup>7</sup> See Walter A. Effross, *Grammarians at the Gate: The Rehnquist Court's Evolving "Plain Meaning" Approach to Bankruptcy Jurisprudence*, 23 SETON HALL L. REV. 1636, 1761-62 (1993); *see also infra* part VI.

Many commentators agree that the current Code provides chiefly debtor relief (the ubiquitous "fresh start"<sup>8</sup>), with creditor's rights existing only appurtenant to this purpose.<sup>9</sup> Opinions may vary as to how these goals are to be accomplished, but none dispute that at the center of this debate is the issue of the automatic stay.<sup>10</sup> The automatic stay protects both debtors and creditors. Debtors are protected by gaining the oversight of the court in matters of prepetition debt.<sup>11</sup> Creditors benefit in that no individual creditor can improve its position at the expense of the remaining ones, once the bankruptcy petition has been filed, without getting the court's permission first.<sup>12</sup> Such protection, however, is conditioned on the desire that creditors will cease and desist their usurious ways when faced with the possibility of judicial sanction.<sup>13</sup> In the true fashion of nearsighted legislation,<sup>14</sup> however, Congress neglected to define

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<sup>8</sup> See, e.g., Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985).

<sup>9</sup> See BRIAN A. BLUM, BANKRUPTCY AND DEBTOR/CREDITOR § 10.3 (1993) (pointing out, however, that this is a recent reversal of priorities); Jackson, *supra* note 8; cf. THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 5 (1986) (stressing the administrative efficiency goals of the Bankruptcy Code); Sheryl L. Scheible, *Bankruptcy and the Modification of Support: Fresh Start, Head Start, or False Start?*, 69 N.C. L. REV. 577 (1991).

<sup>10</sup> "Section 362 is the linchpin of the modern Bankruptcy Code." The Honorable William T. Bodoh, Remarks to Prof. Nancy B. Rapoport's Debtor/Creditor class at the Ohio State University College of Law (Nov. 22, 1994).

<sup>11</sup> See *Fidelity Mortgage Investors v. Camelia Builders, Inc. (In re Fidelity Mortgage Investors)*, 550 F.2d 47, 55 (2d Cir. 1976) (noting that without the automatic stay, what we have is "a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts"), *cert. denied*, 429 U.S. 1093 (1977). Even so, debtors do not go lightly into bankruptcy. "To encourage voluntary-participations . . . we develop a system that balances opportunities and risk for the debtor." Elizabeth Warren, *Why Have a Federal Bankruptcy System?*, 77 CORNELL L. REV. 1093, 1096 (1992).

<sup>12</sup> "[B]ankruptcy disputes are better characterized as creditor-versus-creditor, with competing creditors struggling to push the losses of default onto others." Warren, *supra* note 4, at 785; see also BLUM, *supra* note 9, § 16.1 ("Since time immemorial, dogs have responded to the command 'stay' by resting on their behinds and forgoing intended activity.").

<sup>13</sup> "Once a bankruptcy case has been filed, parties seeking to litigate against the debtor outside the bankruptcy court . . . act at their own peril." Henry J. Sommer, *The Automatic Stay Packs a Punch*, FAM. ADVOC., Winter 1992, at 50, 52.

<sup>14</sup> For a good overview of the pros and cons of the legislative process, see William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987).

what—other than the monetary sanctions of § 362(h)—would result if creditors failed to respect the stay.<sup>15</sup>

In this Note, I will examine the instances when a creditor acts in violation of the automatic stay. Part II examines the motivation for having a federal bankruptcy system, as it is there that the rules of interpretation begin to take shape. The dimensions of the automatic stay in the Bankruptcy Code are outlined in Part III, including how a creditor, seemingly outside the dimensions of the automatic stay, can find herself unknowingly in trouble. Part IV examines the distinction between “void” and “voidable” acts in areas of the law outside of bankruptcy. After viewing the void and voidable doctrines in other legal realms, Part V will then examine the plain meaning approach to legal language both in general and in the specific instance of federal bankruptcy. Part VI will suggest a resolution to the void/voidable debate that serves the needs of the participants in federal bankruptcy, including unwitting participants. It is my contention that this solution is the only satisfactory one, and that it is consistent with the plain meaning approach to legislative interpretation.

## II. THE HISTORY AND GOALS OF FEDERAL BANKRUPTCY LAW

In a perfect world, language would be unambiguous.<sup>16</sup> Of course, in this conception of a perfect world, many lawyers would therefore be unemployed. Should this observation seem cynical, let me be quick to remind you of what most would agree upon—that this not a perfect world, language can still be deceptive, and bankruptcy protection is still necessary.<sup>17</sup> Being residents in an

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<sup>15</sup> 11 U.S.C. § 362(h) (1994). In an era where legislators win or lose their seats by their stands on financial issues, this is hardly surprising. See *infra* part III.D for a discussion of § 362(h).

<sup>16</sup> Any self-respecting linguist would take umbrance with such a flippant remark. It presupposes that language exists only to convey meaning. Even if that were so, this still presumes there is no value in ambiguity. See MAX BLACK, *THE LABYRINTH OF LANGUAGE* 63 (1968) (“The words a speaker uses in an utterance are one thing; the thought ‘behind the words’ is another. The words may be adequate or inadequate to the thought; the speaker may wish to conceal at least part of his thought; and so on.”). Philosophers, however, are usually not so open-minded. See S. Cavell, *Must We Mean What We Say?*, in *PHILOSOPHY AND LINGUISTICS* 131, 138–39 (Colin Lyas ed., 1971) (“[U]nless what I say is flatly false or unless I explicitly contradict myself, it is pointless to suggest that what I say is wrong or that I must mean something other than I say . . .”).

<sup>17</sup> For an interesting analysis of the problems underlying bankruptcy policymaking (and the inspiration for this discussion), see Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336 (1993). More to the point of the linguistic

imperfect world, however, we are faced with the task of trying to eliminate ambiguity from the Bankruptcy Code. Such an endeavor is impossible without at least some basic understanding of the goals of federal bankruptcy. These goals, in turn, are not self-evident.<sup>18</sup> Congressional intent can be determined in at least three ways: (1) an exploration of past bankruptcy legislation and the intent thereof, if discernible; (2) an examination of the current Code's legislative history; and (3) an analysis of the language used in the statute and its accepted legal import. I will briefly examine the first two here and then revisit them when investigating the third in Parts V & VI.<sup>19</sup>

The federal bankruptcy system traces its justification and empowerment to the Constitution.<sup>20</sup> The current Bankruptcy Code was enacted in 1978,<sup>21</sup> repealing the Bankruptcy Act of 1898.<sup>22</sup> The previous Bankruptcy Act was by far the most resilient attempt by Congress to exercise its constitutional authority. Prior to the Act, Congress enacted and repealed three short-lived Acts—the Bankruptcy Act of 1800,<sup>23</sup> the Bankruptcy Act of 1841,<sup>24</sup> and the Bankruptcy Act of 1867.<sup>25</sup> In contrast, the Bankruptcy Act of 1898 survived with only one major amendment, the Chandler Act of 1938,<sup>26</sup> until its repeal in 1978. Since 1978, the Bankruptcy Code has gone through significant reforms in 1984,<sup>27</sup> 1986<sup>28</sup> and most recently in 1994.<sup>29</sup> Despite this consistent

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analysis here, Professor Warren recognizes that linguistic interpretation may extend to her own writings and makes a conscious choice to keep her style simple. *Id.* at 338.

<sup>18</sup> Baird, *supra* note 4, at 816–22.

<sup>19</sup> See *infra* parts V & VI.

<sup>20</sup> “The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . .” U.S. CONST. art. I, § 8, cl. 4; see Flics & Cassidy, *supra* note 5, at 32. Through the operation of preemption, there is no state bankruptcy law. See *Kalb v. Feuerstein*, 308 U.S. 433, 439–44 (1940). Accordingly, I use the terms “federal bankruptcy” and “bankruptcy” interchangeably throughout this Note.

<sup>21</sup> Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101–1330 (1994)).

<sup>22</sup> Ch. 541, 30 Stat. 544 (codified as amended at 11 U.S.C. §§ 1–1103 (1976 & Supp. I 1977), repealed by Pub. L. No. 95-598, 92 Stat. 2549 (1978)).

<sup>23</sup> Ch. 19, 2 Stat. 19 (1800), repealed by Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

<sup>24</sup> Ch. 9, 5 Stat. 440 (1841), repealed by Act of Mar. 3, 1843, ch. 82, 5 Stat. 614 (repealed only 18 months after enactment).

<sup>25</sup> Ch. 176, 14 Stat. 517 (1867), repealed by Act of June 7, 1878, ch. 160, 20 Stat. 99.

<sup>26</sup> Ch. 575, 52 Stat. 840–940 (1938).

<sup>27</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (enacted to correct jurisdictional defects in the Bankruptcy Code, as identified in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).

intervention by Congress, gleaning the intent of the Code is still not possible from the previous or current statutes themselves, but instead involves exploration of the Code's legislative history.<sup>30</sup>

In the deliberation process prior to the enactment of the Code, the Commission on the Bankruptcy Laws of the United States<sup>31</sup> expressly identified two functions of the bankruptcy process: "to continue law-based orderliness" in the face of the debtor's inability to pay his debts;<sup>32</sup> and the rehabilitation of debtors, "i.e., to provide a meaningful 'fresh start.'"<sup>33</sup> Within these two functions, the Commission empathized with the two possible perspectives, the debtor's need for protection from "the jungle of creditors' pursuit of their individualistic collection efforts" and the creditor's need for "rules that determine rights generally in the debtor's wealth."<sup>34</sup>

### A. *Protection of the Debtor*

Probably the most important debtor-protective device in bankruptcy is the automatic stay, which, beginning at filing, provides a "freeze" for a limited

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<sup>28</sup> Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (among other things, enacting Chapter 12 of the Bankruptcy Code).

<sup>29</sup> Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Once again, Congress failed to grant bankruptcy courts Article III status, despite the recommendations of some of the finest scholars in the field. See NATIONAL BANKRUPTCY CONFERENCE'S CODE REVIEW PROJECT, REFORMING THE BANKRUPTCY CODE 44-49 (Final Report, May 1, 1994).

<sup>30</sup> Warren, *supra* note 17, at 355 n.45 ("Congressional intent is always a slippery concept . . ."). General trends are, however, easier to detect. It is my assertion that the initial federal bankruptcy acts were enacted in the tradition of creditor protection. The term bankruptcy itself "is derived from the statutes of Italian city-states, where it was called *banca rupta* after a medieval custom of breaking the bench of a banker or tradesman who absconded with the property of his creditors." JACKSON, *supra* note 9, at 1 (citing Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189 (1938)). As previously discussed, the Bankruptcy Code at its inception was primarily a debtor remedy. The 1994 Bankruptcy Reform Act appears to be an indication that the pendulum has swung back the other way. For an example of this change in attitude, see the 1994 Act's treatment of the single-asset real estate cases. 11 U.S.C. §§ 101(51B), 362(d) (as amended by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106).

<sup>31</sup> COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. 1, at 84 (1973).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

time, on the relationships between the debtor and the creditor(s).<sup>35</sup> The closest analogy is probably the yellow flag in racing: cars cannot change position until the flag is withdrawn (and this period while the flag is operative provides an ideal opportunity to "pit" and refresh). As we shall see below, this protection is neither all-encompassing nor unassailable, but remains the principal protection available to the debtor in the bankruptcy.

Debtors may also control to some extent which items of the debtor's property become property of the estate.<sup>36</sup> Section 522 of the Bankruptcy Code allows the debtor to exempt certain property from property of the estate.<sup>37</sup> "An exemption is a right granted to an individual debtor to protect certain types or items of property from seizure in satisfaction of debt."<sup>38</sup> For example, under the federal bankruptcy exemptions, a debtor may exempt up to \$2,400 in the value of one motor vehicle.<sup>39</sup> The power to exempt effectively allows the debtor to reduce the balance available to creditors, yet retain items that may have been purchased with their credit. That these exemptions are not automatic, but elective, gives the debtor the power to negotiate on their use, an additional debtor-protective device.

Various other devices exist,<sup>40</sup> but the greatest protection available to debtors is not necessarily a device, rather the end result of many bankruptcy

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<sup>35</sup> Discussed *infra* part III. See also *supra* notes 10–15 and accompanying text.

<sup>36</sup> 11 U.S.C. § 541 (1994) defines what prepetition assets of the debtor the creditor may reach with bankruptcy powers. Prepetition property is within the scope of any filing under Title 11. 11 U.S.C. § 103(a) (1994) ("[C]hapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title."). Postpetition property is generally only property of the estate under Chapters 12 and 13. 11 U.S.C. §§ 1207, 1306 (1994).

<sup>37</sup> 11 U.S.C. § 522 (1994). Actually, what is specifically exempted may be a creature of state law as § 522 expressly authorizes states to "opt-out" of the federal bankruptcy exemptions contained in § 522(d). See 11 U.S.C. § 522(b)(1) (1994).

<sup>38</sup> BLUM, *supra* note 9, § 9.3.

<sup>39</sup> 11 U.S.C. § 522(d)(2) (1994). This does not necessarily mean that the debtor may keep her automobile. The net result of such an exemption is that the debtor may completely exempt from the bankruptcy estate one automobile, if the value of the automobile is less than \$2,400 (this amount may increase if the debtor applies the "wildcard" exemption in § 522(d)(5)). If, however, the value of the automobile in question is greater than the aggregate of exemptions applicable to it, the automobile must be sold, and the cash amount of the applicable exemptions is exempt from the bankruptcy estate. See BLUM, *supra* note 9, § 19.8, at 295–97.

<sup>40</sup> See, e.g., 11 U.S.C. § 1112 (1978, as amended) (stipulating the debtor's right to convert a Chapter 11 filing to another Chapter). Other Chapters have similar, but more expansive, conversion rights for the debtor.

filings, discharge.<sup>41</sup> Discharge is "[t]he debtor's release from liability for the unpaid balance of all debts . . . that are not excluded from discharge under the Code."<sup>42</sup> Discharge is available at the confirmation of the plan of reorganization or the completion of the obligations thereunder, depending on the Chapter.<sup>43</sup> For those filings that make it to discharge, its protection is almost absolute. For those cases not yet there, and those that never make it to discharge, the automatic stay remains the strongest protective device.

### B. *Protection of the Creditor*

Almost every protection granted the debtor may also be interpreted as protecting the creditor.<sup>44</sup> For example, while the individual creditor may be stayed from pursuing her claim, she may rest assured other creditors are in no better position. Thus, the feeding frenzy that might otherwise arise around the debtor, like vultures around carrion, is prevented from occurring, and even the weakest creditor is guaranteed at least some chance at the spoils.<sup>45</sup>

Creditors have the power to institute the bankruptcy proceedings without the consent of the debtor, thus creating the aptly named "involuntary" bankruptcy.<sup>46</sup> The power to bring involuntary cases is limited by the number and type of creditors and the amount of debt owed each.<sup>47</sup>

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<sup>41</sup> I say "many" because some bankruptcy filings do not make it to this stage. See generally TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS* (1989) (discussing a socio-legal study of consumer debtors).

<sup>42</sup> BLUM, *supra* note 9, at 530. Discharge is a "legislatively created benefit, not a constitutional one." *United States v. Kras*, 409 U.S. 434, 447 (1973).

<sup>43</sup> Discharge is Chapter specific. Chapter 11 discharge becomes available at the confirmation of the plan. 11 U.S.C. § 1141 (1994). Chapter 7 discharge is automatic after the expiration of the time for objections to the plan. FED. R. BANKR. P. 4004(c). Both Chapters 12 and 13 provide for discharge only on the completion of payments under the plans. 11 U.S.C. §§ 1228, 1328 (1994), respectively.

<sup>44</sup> For a concise summary—aimed at the nonbankruptcy attorney—of creditors' rights, see LYNN M. LOPUCKI, *STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS* (1985 & Supp. 1990).

<sup>45</sup> See *supra* note 12 and accompanying text. "One of the major purposes of the bankruptcy system is to provide a more efficient and effective method of liquidating debtors' assets when necessary." LOPUCKI, *supra* note 44, at 11.

<sup>46</sup> 11 U.S.C. § 303 (1994). This section does not permit the bringing of an involuntary case in Chapters 12 or 13. *Id.* § 303(a). Once the involuntary petition has been filed, the debtor may always exercise her limited right of conversion. See *supra* note 40.

<sup>47</sup> 11 U.S.C. § 303(b) (1994).



In addition, once the petition has been filed, creditors may, through the powers of the bankruptcy trustee, rely on state fraudulent transfer laws<sup>48</sup> and avoidance of preferences<sup>49</sup> to undo certain transactions made prior to filing. These allow the bankruptcy estate to recapture funds that may have been pressured out of the debtor by overzealous creditors or insiders. Thus, as in the case of the automatic stay and creditors, these powers may be seen as protective to debtors.

### C. Orderliness

Achieving protection for debtors and creditors alike must be done in light of the overriding function of the bankruptcy process—an orderly process of dispute resolution.<sup>50</sup> Prior to the enactment of the Bankruptcy Code, the bankruptcy law was considered unmanageable, at least by the proponents of change.<sup>51</sup> This opinion was apparently shared by the public at large, for the advent of the Code “led to nearly a 60 percent increase in bankruptcy filings” from 1979 to 1980.<sup>52</sup>

Preserving orderliness benefits both creditors and debtors as it ensures that the protections offered above will be predictable and reliable.

## III. THE AUTOMATIC STAY IN BANKRUPTCY

The Bankruptcy Code’s automatic stay provisions are contained in § 362, which states in part, that “a petition filed under section 301, 302, or 303 of this

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<sup>48</sup> 11 U.S.C. § 548 (1994).

<sup>49</sup> 11 U.S.C. § 547 (1994). The recovery period is 90 days before filing for non-insiders and up to one year prior for insiders. Note that the Bankruptcy Reform Act of 1994 reverses the previous judicially made law (the “Deprizio” case, *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1194–95 (7th Cir. 1989)) that payments made to non-insiders before the 90-day period were recoverable if made for the benefit of an insider. *Id.* § 550(c).

<sup>50</sup> See *supra* note 9 and accompanying text.

<sup>51</sup> “The Bankruptcy Act is a mess. The kindest statement is that the Bankruptcy Act was not written to be read aloud.” Douglas R. Rendleman, *Bankruptcy Revision: Procedure and Process*, 53 N.C. L. REV. 1197, 1201 (1975) (Rendleman portrays pre-Code bankruptcy law as an unsuccessful adversary process that was “complicated, protracted, and expensive.” *Id.* at 1203–05).

<sup>52</sup> Ronald M. Martin, *Creditor Alternatives to Obtain Relief from Automatic Stays in Bankruptcy*, 98 BANKING L.J. 525, 525 (1981).

title . . . operates as a stay, applicable to all entities . . . ."<sup>53</sup> These provisions were not new to federal bankruptcy law, but offered a more laconic approach to debtor protection than had been previously taken.<sup>54</sup> The legal nature of stays in general is unclear, and this opacity will have a direct result in our "plain meaning" approach in Part V and its application in Part VI.<sup>55</sup>

Regardless of its true nature, the automatic stay is unquestionably one of the most—if not the most—important elements of bankruptcy.<sup>56</sup> In order to better understand the stay, I will examine it in terms of when it applies and who and what is or is not affected. Next, I will examine the instances where the stay is suppressed. Finally, without examining the legal nature of the violations themselves, I will examine the statutory ramifications of violating the stay.

### A. *When the Automatic Stay Applies*

The protection in § 362 is triggered automatically by the filing of the bankruptcy petition.<sup>57</sup> Notice is not necessary for the stay to be effective

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<sup>53</sup> 11 U.S.C. § 362(a) (1994). As previously mentioned, Chapter 3 applies to Chapters 7, 11, 12 and 13 of Title 11. See *supra* note 36. Thus, the stay applies in all cases filed under Title 11.

<sup>54</sup> The origin and application of the automatic stay in federal bankruptcy law is discussed in great detail in a series of articles by Professor Kennedy. See Frank R. Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH. J.L. REF. 175 (1978) [hereinafter Kennedy, *Automatic Stay I*]; Frank R. Kennedy, *Automatic Stays Under the New Bankruptcy Law*, 12 U. MICH. J.L. REF. 1 (1978) [hereinafter Kennedy, *Automatic Stay II*]. Professor Kennedy traces the origins of the stay to the farm debtor relief acts signed by President Hoover. Kennedy, *Automatic Stay I*, at 179 (referring to ch. 240, § 75(O), 47 Stat. 1467, 1473 (1933)). Although short-lived, this proto-stay was to be the model by which several subsequent legislative stays were constructed. The power and scope of the stay were gradually broadened to protect larger classes of debtors from larger classes of creditors. *Id.* at 179–89.

<sup>55</sup> The nature of the stay is treated in detail in parts VI.A.1 & VI.A.2.

<sup>56</sup> For an excellent analysis of the importance of the automatic stay in bankruptcy, see Robert A. Johnson & Marilyn C. O'Leary, *Automatic Stay Provisions of the Bankruptcy Act of 1978*, 13 N.M. L. REV. 599 (1983) (tailored to the New Mexico practitioner, but nonetheless a well thought-out analysis). See also Richard F. Broude, *The Automatic Stay*, C867 A.L.I.-A.B.A. 379 (1993); Daniel Keating, *Offensive Uses of the Bankruptcy Stay*, 45 VAND. L. REV. 71 (1992); Kennedy, *Automatic Stay I*, 190–210; Jeffrey Sapir, *Automatic Stay*, in HANDLING YOUR FIRST PERSONAL BANKRUPTCY 1992, at 149 (PLI Com. L. & Practice Course Handbook Series No. A-641, Order No. A4-4396); Stephen W. Seifert & Caroline C. Fuller, *Annulment of the Automatic Stay*, 20 COLO. LAW. 1811 (1991); Sommer, *supra* note 13, at 50.

<sup>57</sup> 11 U.S.C. § 362(a) (1994). It does not matter if the case is a voluntary or involuntary one. Thus, creditors who are capable of bringing an involuntary petition must

against a creditor.<sup>58</sup> Except as otherwise provided in Section C below, the stay remains in effect until the property in question is no longer property of the estate<sup>59</sup> or until the bankruptcy case is closed, dismissed, or discharge is granted or denied.<sup>60</sup>

### B. Who and What Is Covered by the Stay

As previously mentioned, the stay operates against all entities.<sup>61</sup> "Entity"—as defined by the Code—includes any "person, estate, trust, governmental unit, and [the] United States trustee."<sup>62</sup> This assertion is, however, an overstatement, as the debtor is not stayed from acting once the petition has been filed.<sup>63</sup> In addition, actions taken by a "governmental unit to enforce such governmental unit's police or regulatory power" are not stayed.<sup>64</sup> Governmental units are also not stayed when issuing a notice of tax deficiency.<sup>65</sup> In-depth examination of the exceptions is beyond the scope of this Note, but § 362(b) should be read carefully to determine what exceptions may also apply.<sup>66</sup>

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also realize that by so doing, they will implement a device that keeps them in check. See BLUM, *supra* note 9, § 16.3.

<sup>58</sup> Martin, *supra* note 52, at 530 (stating that the stay is effective "[w]ithout formal service of process"); see also *In re Davis*, 74 B.R. 406, 410 (Bankr. N.D. Ohio 1987); *In re Garcia*, 23 B.R. 266, 267 (Bankr. N.D. Ill. 1982).

<sup>59</sup> 11 U.S.C. § 362(c)(1) (1994). For example, if property originally thought to be property of the bankruptcy estate is deemed exempt under § 522, the automatic stay is lifted in regard to said property. This does not mean that the creditors can now pursue the property unchecked, however, as such property is then protected under the guise of § 522 during the scope of the bankruptcy and by § 524 thereafter.

<sup>60</sup> 11 U.S.C. § 362(c)(2) (1994).

<sup>61</sup> "A petition filed under the Bankruptcy Code operates as a stay pursuant to 11 USCS § 362(a) applicable to all entities, including the Federal Government." Jondavid S. Delong, Annotation, *Federal Government's Liability for Damages Under 11 USCS § 362(h) for Willful Violation of Automatic Stay in Bankruptcy*, 117 A.L.R. FED. 1, 1 (1994).

<sup>62</sup> 11 U.S.C. § 101(15) (1994).

<sup>63</sup> *Carley Capital Corp. v. Fireman's Fund Ins. Co.*, 889 F.2d 1126, 1127 (1989).

<sup>64</sup> 11 U.S.C. § 362(b)(4) (1994).

<sup>65</sup> 11 U.S.C. § 362(b)(9) (1994). For more on the interface between bankruptcy and the IRS, see *infra* notes 149, 150 and accompanying text.

<sup>66</sup> 11 U.S.C. § 362(b) has on its face 18 exceptions (subsections), including but not limited to alimony or paternity actions, § 362(b)(2)(A)(i) & (ii), presenting or protesting the dishonor of negotiable instruments, § 362(b)(11), and a demand for tax returns, § 362(b)(9)(C).

Note that the protection power of § 362(a) runs towards debtors and estates, not creditors and other interested parties.<sup>67</sup> Otherwise, it would lead to the ridiculous result of the Code staying its own proceedings.<sup>68</sup> Protection may extend to parties other than the debtor, but only to the extent that an action against those parties would affect property of the estate.<sup>69</sup>

Thus, in order for an action to be covered by the stay, it generally must be one that affects the bankruptcy estate<sup>70</sup> or the debtor<sup>71</sup> directly.<sup>72</sup> Any interest, legal or equitable, a debtor has in property is eligible to be property of the estate and is therefore subject to the automatic stay.<sup>73</sup> Section 541 of the Bankruptcy Code dictates what is property of the estate and should be carefully scrutinized.<sup>74</sup>

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<sup>67</sup> *Bryce v. Stivers (In re Stivers)*, 31 B.R. 735, 735 (Bankr. N.D. Cal. 1983). Co-owners of property with the debtor therefore have no standing to claim a violation of the automatic stay when the bankruptcy trustee sells the property. *Magnoni v. Globe Inv. & Loan Co. (In re Globe Inv. & Loan Co.)*, 867 F.2d 556, 560 (9th Cir. 1989).

<sup>68</sup> In fact, other proceedings brought by the debtor are generally not stayed. *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 574 (9th Cir. 1992).

<sup>69</sup> Compare *Marcus, Stowell & Beye Gov't Sec., Inc. v. Jefferson Invest. Corp.*, 797 F.2d 227, 230-31 (5th Cir. 1986) (holding that the automatic stay does not affect co-defendants in another judicial proceeding) with *Bleak v. United States*, 817 F.2d 1368 (9th Cir. 1987) (holding that actions against nondebtor may be stayed if the result of such actions would in effect be a judgment against the debtor).

<sup>70</sup> "The automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control over property of the estate." *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1474 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 1048 (1992).

<sup>71</sup> Some parts of § 362(a) protect not only the estate, but the debtor as an individual. See, e.g., 11 U.S.C. § 362(a)(2) (staying the enforcement of judgments against the debtor); 11 U.S.C. § 362(a)(6) (staying acts to collect, assess, or recover claims against the debtor); 11 U.S.C. § 362(a)(8) (staying the commencement or continuation of United States Tax Court proceedings against the debtor).

<sup>72</sup> Rare exceptions exist. For example, "in very limited situations[,] a Section 362 stay may apply to actions against nonbankrupt defendants . . . if extension of the stay contributes to the debtor's efforts of rehabilitation or the debtor and nonbankrupt are closely related." *Garrity v. Hospital Consultants, Inc. (In re Neuman)*, 128 B.R. 333, 336-37 (Bankr. S.D. N.Y. 1991).

<sup>73</sup> See, e.g., *Chart House, Inc. v. Maxwell (In re Maxwell)*, 40 B.R. 231 (Bankr. N.D. Ill. 1984) (holding that if the debtor is a tenant in possession under an expired lease, she still maintains a slight equitable interest which is protected by the automatic stay).

<sup>74</sup> 11 U.S.C. § 541 (1994).

### C. Suppression of the Stay

Suppression of the automatic stay can occur in one of three ways: (1) a statutorily determined exception to the automatic stay applies;<sup>75</sup> (2) a party applies for and receives permission from the bankruptcy court to commit what would otherwise be considered a violation of the stay;<sup>76</sup> or (3) the party failed to apply for relief and committed an act that is covered by the stay, but such act is subsequently ratified by the court.<sup>77</sup> I will briefly examine the latter two cases here.

Prior to the 1994 Amendments, the Bankruptcy Code indicated two instances when a party might apply for and be granted suppression of the automatic stay.<sup>78</sup> In the first, if the party requesting relief can demonstrate inadequate protection,<sup>79</sup> the stay may be suppressed.<sup>80</sup> Second, if the debtor has no equity in property which is not necessary for a reorganization, the stay may also be lifted.<sup>81</sup>

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<sup>75</sup> 11 U.S.C. § 362(b) (1994); *see supra* part III.B.

<sup>76</sup> "On request of a party in interest . . . the court shall grant relief from the stay . . . by terminating, annulling, modifying, or conditioning such stay . . . ." 11 U.S.C. § 362(d) (1994).

<sup>77</sup> *Id.* While technically any order for relief under § 362 is entitled "relief" from the stay, henceforth I will use the term in a much more limited sense, i.e., only those instances when the stay is suppressed *before* the creditor acts. For instances when the creditor has acted prior to an order, I use the terms "annulment" and "ratification" interchangeably. When referring generally to both relief and annulment, I will use the term "suppression."

<sup>78</sup> 11 U.S.C. § 362(d) (1994).

<sup>79</sup> 11 U.S.C. § 362(d)(1) (1994) ("for cause, including the lack of adequate protection of an interest in property of such party in interest"). Adequate protection, when called for in the statute, is provided for in § 361. 11 U.S.C. § 361 (1994).

<sup>80</sup> This is a codification of the Supreme Court's holding in *Wright v. Union Central Life Insurance Co.*, 311 U.S. 273, 278 (1940). Amongst the myriad of writings discussing adequate protection, see especially William J. Wahoff, *The Adequate Protection of Secured Creditors in Termination of Stay Litigation Under the Bankruptcy Code*, 43 OHIO ST. L.J. 715 (1982). Note that this is the opposite of what a party seeking an injunction must do, and is reminiscent of equity. *See infra* part VI.A.1.

<sup>81</sup> 11 U.S.C. § 362(d)(2) (1994) (providing "with respect to a stay of an act against property . . . of this section, if—(A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization . . . ."); *see* David W. Meadows, *Bankruptcy Code Section 362(d)(2): Protecting Turnkey Sale Values in Liquidations Under the Bankruptcy Code*, 21 LOY. L.A. L. REV. 893 (1988).

Finally, in 1994, the legislature codified the holding in the single-asset real estate cases,<sup>82</sup> that a debtor who has substantially all income derived from a single, real property may be subject to an earlier suppression of the stay with respect to that property than other debtors without such a limited income.<sup>83</sup> These qualifications apply regardless of whether the party is applying for relief or annulment of the stay.

It is my contention, however, that there is a fundamental difference between relief from the stay and annulment of the stay. This distinction will become important when we examine the void and voidable doctrines. First, though, it is appropriate to briefly examine both relief and annulment here.

### 1. *Terminating, . . . Modifying, or Conditioning*

Creditors who wish to pursue property of a debtor contemplating bankruptcy face a difficult choice. If they act prepetition, there is the possibility that the action may not be complete before the petition is filed—when the automatic stay intervenes.<sup>84</sup> Such an action might turn out to be a waste of the creditor's time, because if relief is not granted, the action will have been for naught (it will not improve that creditor's position to show that they actively pursued their rights).<sup>85</sup>

If instead the creditor waits for the petition, such an event may never occur, and the waiting time will be time lost.<sup>86</sup> Regardless of the choice made, once a petition is filed, the stay applies, and the creditor must apply to the court to begin or continue any action.<sup>87</sup> Upon such an application, if the court finds that one of the three elements of § 362(d) has been met, the court then has the discretion whether or not to terminate, modify, or condition the stay.<sup>88</sup> Nothing

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<sup>82</sup> See, e.g., *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988).

<sup>83</sup> 11 U.S.C. § 362(d)(3) (1994); see Mark N. Polebaum & Erik P. Kimball, *Single Asset Real Estate Reorganizations*, C784 A.L.I.-A.B.A. 551 (1992).

<sup>84</sup> In addition, should the action be completed, it may still be avoidable under fraudulent transfer laws. See 11 U.S.C. § 548 (1994).

<sup>85</sup> The bankruptcy court is a court of equity and as such has broad powers to value claims. *Barton v. Barbour*, 104 U.S. 126, 134 (1881). Even so, courts "classify claims, not creditors." DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 247 n.6 (rev. ed. 1993). Therefore, the creditor's actions have no effect on the valuation of an otherwise valid claim.

<sup>86</sup> And, in the interim, another creditor may act successfully.

<sup>87</sup> See *supra* notes 75–77 and accompanying text.

<sup>88</sup> This is to say that the court has the choice of what form of relief to grant. If the requirements of § 362(d) are met, however, the court may not in its discretion refuse to grant relief. 11 U.S.C. § 362(d) ("On request of a party in interest and after notice and a hearing, the court *shall* grant relief from the stay . . .") (emphasis added).

in the court's decision to do any of the preceding affects the nature of the act itself, as the act has not yet been committed.

## 2. Annulment

What if the creditor acts without knowledge of the stay's existence or scope? Such acts are under the scope of § 362. Notification is not an element of the stay.<sup>89</sup> The creditor is not without remedy, however. Creditors, upon a showing of one of the elements of § 362(d), may still have the court annul the stay for the offending act.<sup>90</sup>

Although annulment of the stay finds its source in the same Code section as the other forms of relief, it is inherently different than those other remedies.<sup>91</sup> While termination, modification, or conditioning the stay all change the nature of the stay, annulment does not affect the stay at all; it changes the nature of the act. The stay remains in effect and unchanged for all other acts.

### D. Violations of the Automatic Stay

"The consequences of violating the automatic stay . . . are set forth in § 362(h), which provides that: '[A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.'" <sup>92</sup> Note that § 362(h) provides for damages in the case of *willful* violations towards individual debtors. In the case of inadvertent violations of the stay, § 362(h) will not apply.

It is also commonly accepted that partnerships, corporations, and other legal entities are not eligible to receive damages under § 362(h).<sup>93</sup> It is

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<sup>89</sup> See *supra* note 58 and accompanying text.

<sup>90</sup> It is also possible the court may grant relief that does not easily fit into any of the four aforementioned types of relief. The language of § 362(d) implies that these categories—termination, modification, conditioning, and annulment—are only suggestions, i.e., "the court shall grant relief from the stay . . . *such as by* . . . ." (emphasis added).

<sup>91</sup> For a more in-depth analysis of annulments of the automatic stay, see Seifert & Fuller, *supra* note 56, at 1811.

<sup>92</sup> *In re Holman*, 92 B.R. 764, 767–68 (Bankr. S.D. Ohio 1988) (citing 11 U.S.C. § 362(h) (1978, as amended)). "[A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h) (1994).

<sup>93</sup> The argument is a convincing one, that is, 11 U.S.C. § 101(41) defines person as being either an "individual, partnership, [or] corporation." Thus, by implication, being an

therefore necessary, both in the instance of inadvertent stay violations and non-human debtors, that the debtor seek remedy outside of § 362(h) via a contempt order.

The bankruptcy court has wide powers under § 105 to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."<sup>94</sup> Thus, even though an action may not be subject to statutory damages, either because of the nature of the action or the nature of the debtor, the court may still fashion other forms of relief. It is not clear whether the court can apply both § 362(h) damages and § 105 relief to a single action, but the need for this dual remedy seems small.

#### IV. THE VOID/VOIDABLE DOCTRINES

Black's Law Dictionary discusses the differences between void and voidable doctrines by saying the following:

There is this difference between the two words "void" and "voidable": *void* in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it; *voidable* exists when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it.<sup>95</sup>

The void/voidable distinction is not peculiar to bankruptcy proceedings. It also occurs in several disparate areas of the law. It is, therefore, a useful exercise to examine the two doctrines separately outside of bankruptcy, in particular in the law of contracts, before examining the bankruptcy issues.

##### A. *Void*

The crucial element of the identification of an act as void is that the act is in violation of some legal principle and is incurable.<sup>96</sup> Contracts may be void for one of two reasons: (1) the elements of an enforceable contract have not

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individual means *not* being one of the others. See Arturo G. Hernandez, Note, 11 U.S.C. § 362(h): *Congressional Answer to the Bankruptcy Abuse of Consumer Creditors*, 56 OHIO ST. L.J. 617, 627 (1995).

<sup>94</sup> 11 U.S.C. § 105(a) (1994).

<sup>95</sup> BLACK'S LAW DICTIONARY 1573 (6th ed. 1990).

<sup>96</sup> A void instrument has been defined as an instrument or transaction which is wholly ineffective, inoperative, and incapable of ratification and thus has no force or effect "so that nothing can cure it." *In re Oliver*, 38 B.R. 245, 247 (Bankr. D. Minn. 1984) (quoting BLACK'S LAW DICTIONARY 1411 (5th ed. 1979)).



been completed,<sup>97</sup> or (2) the elements are achieved, but the contract is culturally undesirable.<sup>98</sup> What the two cases have in common is that no amount of first aid by the parties—or the court—can heal them. In the latter case, an illegal contract cannot be ratified by the court.<sup>99</sup> Changing the bargain to eliminate the illegality, for example, simply results in a separate, enforceable contract. The same is true for the former—change begets a new and different contract.<sup>100</sup> Thus, when a transaction is deemed void, or void *ab initio*, it is as if the transaction did not occur. There can be no legal redress for the occurrence (unless there is specific statutory treatment), as the act is otherwise legally deemed to never have occurred.<sup>101</sup>

### B. Voidable

In the case of a voidable act, such an act is no less in violation of legal principles than those acts which are simply void.<sup>102</sup> The difference is that in the case of a voidable act, courts generally let sleeping dogs lie; that is, they leave the contract alone unless a party objects.<sup>103</sup> If a merchant makes a contract for a non-necessity with a minor, for example, courts will let the contract stand unless the minor objects.<sup>104</sup> The minor may disaffirm the contract, but in so doing, the entire contract is avoided, not just the portions inconvenient to the

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<sup>97</sup> For example, a contract may be considered void for lack of consideration. A promise to pay a pension for services already rendered is void for lack of consideration, as past consideration is insufficient to bind a promisor. *Plowman v. Indian Ref. Co.*, 20 F. Supp. 1 (E.D. Ill. 1937). See generally E. ALLAN FARNSWORTH, *CONTRACTS* §§ 2.3–2.15 (2d ed. 1990).

<sup>98</sup> “Parties cannot make a binding contract in violation of law or of public policy.” *Sternaman v. Metropolitan Life Ins. Co.*, 62 N.E. 763, 764 (N.Y. 1902). Such contracts are void. See generally FARNSWORTH, *supra* note 97, at 345–90.

<sup>99</sup> RESTATEMENT (SECOND) OF CONTRACTS § 179 (1979).

<sup>100</sup> *Id.* §§ 7, 12, 14.

<sup>101</sup> This becomes more important when we examine the procedural consequences of stay violations. See *infra* part VI.

<sup>102</sup> The term “voidable” has been defined as that which may be avoided, or declared void; not absolutely void, or void in itself. It imports “a valid act which may be avoided as opposed to an invalid act that may be ratified.” *United States v. Price*, 514 F. Supp. 477, 480 (S.D. Iowa 1981).

<sup>103</sup> See FARNSWORTH, *supra* note 97, § 4.4.

<sup>104</sup> The classic case in this realm is in actuality a tort action, couched in contract-like theories. *Brunhoelzl v. Brandes*, 100 A. 163, 163 (N.J. Sup. Ct. 1917) (holding a minor not subject to tort liability in the bailment of an automobile).

minor.<sup>105</sup> Voidable acts may also be ratified, that is, the power to disaffirm may be surrendered.<sup>106</sup>

## V. THE PLAIN MEANING APPROACH TO THE BANKRUPTCY CODE

Legislative interpretation is always a tricky thing.<sup>107</sup> Competing theories abound, and choosing among them would be nearly impossible without guidance from the legislature or the courts.<sup>108</sup> Recently, the Supreme Court has taken a very straightforward approach to interpreting statutes,<sup>109</sup> and correspondingly the Bankruptcy Code. Under the direction of Justice Scalia, the Rehnquist Court has adopted a strict textual approach to deconstructing statutory meaning, and this approach has received both praise and criticism within the bankruptcy community.<sup>110</sup>

The problem with textualism is generally not the theory itself, but rather many academics' misunderstanding of the theory.<sup>111</sup> Justice Thomas sums it up best: "When the words of a statute are unambiguous, then, this first canon is

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<sup>105</sup> FARNSWORTH, *supra* note 97, § 4.4, at 231.

<sup>106</sup> *Id.* § 4.4, at 232.

<sup>107</sup> "Perhaps the most omnipresent jargon in modern society is that of the bureaucrat . . . [T]he really important question is *why* bureaucratic prose so often fits the pungent term (coined by the Texas Congressman Maury Maverick) 'gobbledygook.'" ROBERT CLAIBORNE, *OUR MARVELOUS NATIVE TONGUE: THE LIFE AND TIMES OF THE ENGLISH LANGUAGE* 276 (1983).

<sup>108</sup> See *supra* note 6 and accompanying text.

<sup>109</sup> See, e.g., *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (holding that the statute giving the courts of appeals jurisdiction over, *inter alia*, appeals from all final orders of district courts sitting as appellate courts in bankruptcy, did not limit interlocutory review statute by negative implication); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989) (evincing a marked reluctance to look beyond the plain meaning of the Bankruptcy Code when interpreting 11 U.S.C. § 506(b)).

<sup>110</sup> See C. Robert Morris, *Bankrupt Fantasy: The Site of Missing Words and the Order of Illusory Events*, 45 ARK. L. REV. 265 (1992); Charles Jordan Tabb & Robert M. Lawless, *Of Commas, Gerunds, and Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823 (1991); see also Kelch, *supra* note 6.

<sup>111</sup> For example, the one author who has mentioned the theory in connection with the void/voidable debate does so only in passing. Robert R. Niccolini, Note, *The Voidability of Actions Taken in Violation of the Automatic Stay: Application of the Information-Forcing Paradigm*, 45 VAND. L. REV. 1663, 1677 (1992). The note analyzes the void/voidable debate in terms of the so-called "information forcing paradigm" of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). *Id.* at 1674-76. What Mr. Niccolini does not seem to realize is that the theory is the beginning and end of the analysis—economic theories are unnecessary when the plain meaning is clear. See *infra* notes 118-22 and accompanying text.

also the last: 'judicial inquiry is complete.'"<sup>112</sup> Inherent in this statement is that plain meaning is applied at the outset. If it is conclusive, then the analysis ends. If it is not, then the courts may look to other factors. Probably one of the best inquiries into the first and subsequent steps is done by Professor Thomas Kelch.<sup>113</sup> Although Professor Kelch has provided what may be considered the definitive rule for plain meaning analyses, his rule is subject to the same problems of interpretation as the statutes themselves. Another scholar has taken the same methodology used by Professor Kelch, but has broken it into "six realms of relevance, each progressively more inclusive and farther removed from the literal meaning of the code section in question."<sup>114</sup> Although not expressly stated by the author, one assumes that the methodology involves applying the stages in linear fashion, and terminating the inquiry whenever a particular stage yields definitive results. In such a case, the later stages are not examined, no matter how useful they may appear to be.<sup>115</sup> The six stages in question are as follows:

- (1) One subsection's language in a vacuum.
- (2) Similar or dissimilar usage in the same section.
- (3) Similar or dissimilar usage across different sections.
- (4) The policies underlying the Bankruptcy Code.
- (5) The goals of other statutes, both federal and state.
- (6) A consideration of equities of the matter.<sup>116</sup>

Note that simply because these steps are stated in this manner does not mean that they are mutually exclusive. If, for example, Congress specifically examined the equities of the matter in the legislative history of the statute, then this examination will occur at step four, not step six.

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<sup>112</sup> *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (Thomas, J.) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

<sup>113</sup> "Interpretation of a statute shall be controlled by the [o]rdinary [m]eaning of the language of the statute to the [r]eader, including the [i]nternal [c]ontext of the statute, except where such interpretation would lead to a result not in conformance with reason." Kelch, *supra* note 6, at 311-12. Each of the formerly capitalized terms in Professor Kelch's definition are separately defined in the article.

<sup>114</sup> Effross, *supra* note 7, at 1749 ("Each level of this inquiry, contains inherent ambiguities and contradictions.").

<sup>115</sup> This is consistent with Justice Thomas's comments in *Germain*. *Germain*, 503 U.S. at 254.

<sup>116</sup> Effross, *supra* note 7, at 1749-54 (modified from the original text).

As stated, this six-part test encourages Congress to legislate within the previously accepted legal terminology, and not to create new and specific jargon if unnecessary. This resolution supports legislative economy, and prevents overreaching judicial activism when given blank slates on which to write.

## VI. APPLYING THE DOCTRINES IN BANKRUPTCY

Bankruptcy scholars may wonder why the void/voidable distinction persists, when the Supreme Court has already spoken on the issue. In *Kalb v. Feuerstein*,<sup>117</sup> the appellants had a petition pending in the bankruptcy court, yet two creditors forced a judicial sale in state court.<sup>118</sup> Appellants made no application to the bankruptcy court or state court for a stay of the foreclosure or of the subsequent action to enforce it.<sup>119</sup> Before the Wisconsin Supreme Court, appellants argued that the stay under the Bankruptcy Act then in effect was self-executing.<sup>120</sup> The Wisconsin Supreme Court rejected this argument, determining the bankruptcy stay to be judicial (thus requiring an application to the court) as opposed to statutory (which would require no application).<sup>121</sup>

The United States Supreme Court reversed, holding the bankruptcy stay to be automatic, "a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy."<sup>122</sup> The Court considered the state court's order of judicial sale void, as it violated the automatic operation of the bankruptcy stay.<sup>123</sup> While this is indeed persuasive authority, it is not binding. The *Feuerstein* Court held as it did by interpreting the legislative history of the Bankruptcy Act.<sup>124</sup> The enactment of the Bankruptcy Code and subsequent repeal of the Act render the *Feuerstein* opinion inapplicable. Even so, the majority of the circuits are still persuaded by the *Feuerstein* holding, with one

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<sup>117</sup> 308 U.S. 433 (1940).

<sup>118</sup> *Id.* at 435-36.

<sup>119</sup> *Id.* at 436.

<sup>120</sup> *Id.* at 437.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 439.

<sup>123</sup> But if appellants are right in their contention that the [Bankruptcy] Act of itself, from the moment the petition was filed and so long as it remained pending, operated, in the absence of the bankruptcy court's consent, to oust the jurisdiction of the state court so as to stay its power to proceed with foreclosure, to confirm a sale, and to issue an order ejecting appellants from their farm, the action of the Walworth County Court was not merely erroneous but was beyond its power, *void*, and subject to collateral attack.

*Id.* at 438 (emphasis added).

<sup>124</sup> *Id.* at 439 (interpreting the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544).

major exception, the Fifth Circuit.<sup>125</sup> Thus, the distinction remains alive in the federal courts.

The void/voidability distinction has been identified as a significant concern by several authors in the bankruptcy field.<sup>126</sup> One fairly recent essay chose to analyze the debate in terms of the "information-forcing paradigm."<sup>127</sup> This paradigm is the logic behind the well-known contracts dispute in *Hadley v. Baxendale*.<sup>128</sup> In *Hadley*, the court reasoned that had the plaintiff wanted to insure the defendant's prompt action, the plaintiff would have informed the defendant of the damages that arise from delay. In so holding, the court established a principle that forced the complaining party to fully inform others of special circumstance from which conflicts might arise. The author of that essay finds support for the voidable theory of stay violations in this theory.<sup>129</sup> It is his contention that the treatment of stay violations as voidable will encourage the debtor to fully inform others of the bankruptcy filing rather than sitting back and relying on the absolute protection of the competing void doctrine.<sup>130</sup>

Regardless of whether we choose to adopt this "information-forcing" view of bankruptcy policy, we are still faced with a difficult question: If relief from the automatic stay can be granted (but has not been petitioned for), and the creditor acts in violation of the stay, should the court apply a weighing doctrine (i.e., would the court have granted relief if properly asked for) or should the court invalidate the action outright? The former is treating the actions as voidable, the latter as void.<sup>131</sup>

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<sup>125</sup> See *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) ("[A]ctions taken in violation of an automatic stay are not void . . .") (citing *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989)). Despite the consistent holdings of the other circuits that stay violations are void, district courts still struggle with this issue. See, e.g., *In re Clark*, 79 B.R. 723, 725 (Bankr. S.D. Ohio 1987).

<sup>126</sup> Niccolini, *supra* note 111, at 1663; Stephen W. Sather, *Tax Issues in Bankruptcy*, 25 ST. MARY'S L.J. 1363, 1393 (1994) ("A split of authority presently exists as to whether actions taken in violation of the stay are void or merely voidable.").

<sup>127</sup> Niccolini, *supra* note 111, at 1663.

<sup>128</sup> 9 Ex. 341, 156 Eng. Rep. 145 (1854) (holding a carrier, ignorant of the potential for damages, not liable for the mill-client's damages suffered when the carrier failed to promptly deliver the mill's crankshaft for repair).

<sup>129</sup> Niccolini, *supra* note 111, at 1679.

<sup>130</sup> *Id.*

<sup>131</sup> Broude, *supra* note 56, at 438 ("Why . . . if all acts violating the stay are void, does § 362(d) give the courts the power to annul the stay? The issue may be ripe for reexamination.").

Although nothing in § 362 speaks of either void or voidable acts, we may still examine the pivotal term stay under the plain meaning methodology. Step one in the plain-meaning approach is to examine the subsection's language in a vacuum.<sup>132</sup> Nothing in § 362 speaks of either void or voidable acts. We can determine the meaning of stay at this level by two methods: (1) an analysis of the specific meaning of stay in legal practice, i.e., an analysis of the explicit meaning of the term; or (2) inferring the meaning of stay by examining the other words of the subsection, i.e., an analysis of the implicit meaning of the term.

### A. *Explication*

According to at least one author, in bankruptcy, stays are injunctive in nature.<sup>133</sup> Whether this contention is based upon fact or on theory is unclear. Investigation into the history of stays leads to two possibilities: equity or moratory.

#### 1. *The Case for Equity*

Historically, equity described those remedies that arose from England's Court of Chancery. In particular, the chancellor was looked to as a source of fairness when courts of law failed to do justice.<sup>134</sup> Traditional remedies include injunctions, restraining orders, and contract remedies such as specific or substitutional relief. Although many of today's equitable remedies can be traced to the historical courts of England, many cannot. Equity today "denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse" of persons with one another.<sup>135</sup> The purposes of the stay discussed above, including protection of the debtor from unfair predatory behavior of the creditor, seem consistent with this fairness-based equity theory.

The problem with an equitable approach to stay litigation is that there is more about stays that is inconsistent with equity than is consistent. Traditional equitable remedies were granted when a party had already experienced some harm that law would not repair. In the case of the automatic stay, protection is granted before any such harm has occurred. One traditional equitable remedy

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<sup>132</sup> Effross, *supra* note 7, at 1749.

<sup>133</sup> BLUM, *supra* note 9, § 16.1.

<sup>134</sup> One commentator suggests that the original injunction arose when a court of chancery enjoined the enforcement of a law court's judgment because of fraud. Janet Napolitano, *Injunctions in the Nineties*, LITIG., Spring 1991, at 23.

<sup>135</sup> BLACK'S LAW DICTIONARY 540 (6th ed. 1990); *see also* HAROLD G. HANBURY & RONALD H. MAUDSLEY, MODERN EQUITY 732-34 (Jill E. Martin ed., 13th ed. 1989).

still in use in England, the injunction *quia timet*, is granted in the apprehension of irreparable harm.<sup>136</sup> American courts recognize the validity of such injunctions, but like the British courts, hold them in disfavor.<sup>137</sup>

In addition to this difference in timing, there is also a difference between stays and injunctions in the burdens of the parties before the court. Traditional injunctions were granted on a showing of irreparable harm to the protected party. There is no automatic application of injunctions; their exercise is within the discretion of the court. In cases where such a showing would take too long, a temporary restraining order could be granted by the court. In the bankruptcy automatic stay, no showing is required—harm is presumed. Instead, the party seeking suppression of the stay is charged with showing no irreparable harm. Therefore, stays differ from injunctions in both the immediacy of the application and the shifting of burdens on the parties involved.

Even so, if we were to equate the bankruptcy stay with injunctive-type relief, it is still unclear whether actions in violation of injunctive orders are void or voidable. One suspects that they would be voidable, as the nature of equity would seem to require a balancing of the factors in each individual case.

It is evident that a determination of an equity-based theory of stays will not resolve the void/voidable debate. Therefore, it is necessary to look to another possible source of the bankruptcy stay—moratory laws.

## 2. Moratory Laws

Debtor protection has not always been federal, and even when federal, it has not always arisen solely out of bankruptcy laws.<sup>138</sup> The characterization of stays as arising out of equity has some merit, but it is also very likely that stays

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<sup>136</sup> F.H. LAWSON, REMEDIES OF ENGLISH LAW 188–89 (2d ed. 1980).

<sup>137</sup> “Courts [are] extremely reluctant to issue injunctions . . . before the commission of a wrong. . . . [T]hey require very strong evidence to show that it will occur if they do not act.” *Id.* at 189. For an example of these injunctions in American courts, see *Escrow Agents’ Fidelity Corp. v. Superior Court.*, 4 Cal. App. 4th 491, 493 (1994) (“Although *quia timet* has by and large been abandoned in favor of other legal and equitable pre-judgment remedies, it is by no means obsolete.”). Injunctions *quia timet* are now almost exclusively relegated to the law of suretyship. See Jay M. Mann & Curtis A. Jennings, *Quia Timet: A Remedy for the Fearful Surety*, 20 FORUM 685 (1985).

<sup>138</sup> Even today, debtors may look to other federal laws for assistance. Laws such as the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (1994), are enacted under the authority of the federal Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. See S. REP. NO. 382, 95th Cong., 1st Sess. (1977), reprinted in 1977 U.S.C.C.A.N. 1695.

in general are offspring of the emergency war-time moratory legislation.<sup>139</sup> Moratory legislation is crisis-based legislation<sup>140</sup> that acts to prevent certain types of creditor action in times of war.

Several authorities have equated the legal use of stays with moratory laws.<sup>141</sup> The import of such an association is not immediately clear, for as with the case of equity, it is unclear what is the legal nature of moratory violations. One might assume that the same exigencies that motivate moratory legislation would also motivate subscribing to a void theory.<sup>142</sup>

As in the case of equity, moratory laws do not definitively allow for a determination of either the void or voidability of stay violations. Before abandoning the plain meaning analysis of stays at this first level (subsection in a vacuum), it is still necessary to determine if the other words of the subsection aid in interpreting the term in question.

### B. Implication

While there appears to be no clear way to determine the explicit meaning of the term "stay," the meaning of the stay within § 362 can still be determined by implication.<sup>143</sup> The Fifth Circuit opinion in *Picco v. Global Marine Drilling Co.*<sup>144</sup> is an excellent example of definition by implication. In *Picco*, the court held that "actions taken in violation of an automatic stay are not void, but rather that they are merely voidable, because the bankruptcy court has the power to annul the automatic stay pursuant to section 362(d)."<sup>145</sup> This is consistent with the earlier discussion of the nature of void and voidable acts, i.e., that which is void is void *ab initio*, and incapable of cure.<sup>146</sup> By the fact

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<sup>139</sup> For an excellent early history of moratory laws, see A.H. Feller, *Moratory Legislation: A Comparative Study*, 46 HARV. L. REV. 1061 (1933). See also *In re Purdy's Will*, 73 N.Y.S.2d 38, 44 (1947); *Kirschner v. Cohn*, 58 N.Y.S.2d 561, 561-62 (1945).

<sup>140</sup> Much like the earlier American attempts at bankruptcy legislation. See *supra* part II.

<sup>141</sup> See BALLENTINE'S LAW DICTIONARY 1215 (3d ed. 1969); see also *Brown v. State Nat'l Bank*, 271 P. 833, 834 (Okla. 1927).

<sup>142</sup> For example, judicial economy in a time when all resources are scarce. Feller, *supra* note 139, at 1064.

<sup>143</sup> This is still within the first three steps of the plain meaning approach, i.e., analysis of the plain meaning of the subsection, section, or Code without resorting to legislative approach. See *supra* part V.

<sup>144</sup> 900 F.2d 846 (5th Cir. 1990).

<sup>145</sup> *Id.* at 850 (emphasis omitted) (citing *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989)).

<sup>146</sup> See *supra* part IV.



that § 362(a) allows the court to cure the stay violation, such violations *must be* implicitly voidable.

## VII. CONCLUSION

By applying the Supreme Court's plain meaning approach to legislative interpretation, we have seen that despite an ambiguous legislative history, violations of § 362 must be treated as voidable. The ramifications of such a treatment are twofold: procedural and actual.

The procedural difference in the treatment is that if the action is treated as voidable, it falls upon the debtor to bring an action to set aside the action.<sup>147</sup> This presents no additional burden on bankruptcy debtors, because even in void jurisdictions, cautious debtors' attorneys ask the court for a declaratory ruling that an action is void.<sup>148</sup> For those contemplating action, the differing treatments could simply resolve to one of procedure. (If an action is treated as void, but essentially the action would have been granted relief if properly requested, voiding it will only cause the creditor to request relief, then commit the action again.) This is no different from the voidable treatment except for requiring strict adherence to the procedure. Thus, the conclusion that stay violations are voidable may even present a lesser burden.

Other than the procedural issue, if the action is treated as voidable (and therefore curable), the issue of damages becomes moot if the action is cured. If, however, the action is void or incurable, the damages become crucial, especially in the case of the IRS, recognized by academics and practitioners as one of the most blatant violators of the automatic stay.<sup>149</sup> As the Code has a built-in waiver of sovereign immunity, if the goal of bankruptcy is to protect the debtor, and if actions are truly void, then we should be subjecting the IRS to these damages.<sup>150</sup>

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<sup>147</sup> Or in certain instances, the trustee can exercise its power under § 549 to avoid postpetition transfers of property. 11 U.S.C. § 549(a) (1994).

<sup>148</sup> Of course, as per the previous discussion of the legal import of void acts, no ruling need be obtained, the action is void as a matter of course. Risk-takers may indeed rely on such a policy, but such a reliance borders on malpractice. An attorney who relies on the voidness of an act without consulting the bench may find that the act is not void too late (perhaps an exception to § 362 applied).

<sup>149</sup> Sather, *supra* note 126, at 1393 ("Occasionally, the IRS violates the automatic stay."). One wonders if Mr. Sather was being audited when he expressed this sentiment so weakly.

<sup>150</sup> Section 106(c) of Title 11 expressly provides that any provisions containing the terms "creditor," "entity," or "governmental unit" apply to governmental units and that

By treating such acts as voidable, the difficulty of void treatment disappears. That is, if a void act is treated as if it never occurred, one should not be able to receive common law (i.e., equitable) damages. Damages, other than statutory damages, cannot stem from an act which is treated as never having occurred. Therefore, the conclusion that stay violations are voidable may actually increase the judicial remedies available to the debtor.

Thus, it is clear that by applying the Supreme Court's rationale, stay violations are voidable and thus curable. In addition, while it is essential to the nature of a plain meaning approach that extrinsic factors such as legislative history or general policy concerns not be consulted if the plain meaning is clear, it is also apparent that by following a strict plain meaning approach the debtor may actually be afforded more protection, not less.

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a determination by the court of an issue arising under such a provision binds the governmental unit. Thus, courts may bind taxing jurisdictions in matters concerning the automatic stay.

Sather, *supra* note 126, at 1392-93 (1994) (footnote omitted). "A governmental unit . . . is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit claim arose." 11 U.S.C. § 106(b) (1994).